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No. 09-06

Supreme Court, U.S.
FILED
FEB - 4 2010
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

The Children's Fund et al.,

Petitioners,

v.

Springfield Holding Co. Ltd. LLC et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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The Petitioners herein respectfully move that this Court issue an order (1) vacating its denial of their petition for writ of certiorari, entered by this Court on January 11, 2010, and (2) granting the petition. As grounds for this motion, Petitioners state the following:

1. RESPONDENTS HAVE OFFERED NO ARGUMENT IN OPPOSITION.

Since the Petition in this case was filed on October 7, 2009, Respondents have offered no reason why the Petition should not be granted. They have not responded because there is nothing they can say. The Petition presents pure questions of law, and there is no controlling precedent that they can cite against Petitioners.

We are acutely aware of the practical realities of the discretionary review system. Counsel for the

Petitioners knows that, as an advocate, he is particularly sensitive to the injustices suffered by his clients and that he knows very little about the other cases that are competing for the Court's time and attention. And he knows that this Court works very hard at the challenging task of making hard choices every day.

Nevertheless, it is hard to imagine circumstances under which this case would not be considered worthy of at least allowing briefs on the merits. This case involves what began as a well-intentioned, minor court reform (the unpublication system) which has, without anyone intending it, mushroomed over the last thirty years into an out-of-control national legal scandal that adversely affects every litigant before the United States Courts of Appeals. "Unpublished" opinions, which are printed but cannot be cited as precedent, now account for

84% of all opinions issued by the Courts of Appeal (and adversely affect the remaining 16%). Since these opinions cannot be cited for precedent, the courts in writing them, of course, do not follow precedents. And a court that does not follow precedents is no longer a court of law. It is an unconstitutional mini-legislature. And in the face of this staggering practical problem and departure from our Constitutional system, Respondents can offer *no reason* why the Petition should be denied.

2. THE UNPUBLICATION SYSTEM HAS A DISPROPORTIONATE IMPACT ON LITIGANTS WITH LIMITED RESOURCES.

The unpublication system is not just Petitioners' problem. It is a systemic problem. In this case, the Petitioners are a small, private school that had an endowment of approximately $2,000,000. That endowment was taken from them in a fraudulent

transaction by investment partners. The District Court, in an opinion in which the Court in effect admitted that it did not understand the issues, refrained from enforcing the law. The Court of Appeals, in an unpublished opinion, refrained from intervening, because an unpublished opinion can have no direct effect on other litigants, so (in a sense) the damage was controlled. For the trial before the district court, Petitioners were billed $209,469.87. The appeal cost the Petitioners another $25,000. After committing a quarter of a million dollars because the District Court had reason to believe that it would not be overruled if it refrained from enforcing the law---and because the Court of Appeals does not have to follow precedent if it uses the unpublication system---the Petitioners' resources are now exhausted.

The unpublication system is a systemic problem because a litigant who has less than a quarter of a million dollars to spend on a system that no longer follows precedent can no longer afford to take the risk of litigation in the federal courts. Therefore, the present system of unpublication necessarily has the effect of multiplying litigation, both by the wealthy and by the fraudulent, who (one way or another) hold the cards and can afford to play the game. It necessarily has the effect of suppressing litigation by any party who has less than a quarter of a million dollars available to spend on litigation, especially after they are defrauded. The unpublication system therefore, paradoxically, has the effect of burdening the courts by multiplying undesirable litigation and burdening plaintiffs by suppressing desirable litigation.

3. THIS ISSUE NEEDS TO BE FULLY BRIEFED, WITH SUBMISSIONS BY AMICI CURIAE.

The question of the validity of the unpublication system is an issue of obvious national importance. This case is in effect a class action with the Petitioners representing all litigants before the United States Courts of Appeal now and in the future, and everyone who has less than a quarter million dollars available for litigation. It is possible to argue (Petitioner did not) that constitutional niceties must be suspended because of the sheer force of the recent explosion in litigation. It is possible to argue (Petitioner did not) that the problem is too big for this Court to handle and must be addressed by Congress and by an expansion of the Courts of Appeal. It is possible to argue (Petitioner did not) that the entire Anglo-American tradition of courts that follow legal precedents is either not

desirable or no longer feasible. It is possible to argue (Petitioner did not) that the Constitution contemplates courts of appeal that are not required to follow precedents. But these arguments need to be heard, and all of the litigants before the courts of appeals deserve to have an opportunity to refute them.

In preparing the Petition, counsel for the Petitioners wrote to the ABA, to law-school professors, and to public-interest law firms to ask whether they would be interested in submitting *amicus curiae* briefs in this case. Several of them indicated that they would like to help, but it makes no sense (unless one has either a very wealthy or a politically motivated client paying the bill) to write *amicus curiae* briefs for a Court that can accept less than 1 in 90 of the Petitions addressed to it. If, on the other hand, this Court were to set this case for

briefing on the merits, several such *amici curiae* would quickly come forward. And the issue needs them and deserves them. It would be presumptuous for anyone to decide this question without their considered contribution.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and schedule this case for a briefing on the merits.

February 4, 2010

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this motion for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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Counsel for Petitioner